No. 94-749

Supreme Court, U.S.
FILED
FEB 21 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN J. HURLEY, Individually, and the
SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
An Unincorporated Association By and Through
TIMOTHY DALEY, BARBARA KAY and
CATHLEEN FINN, Acting on Their Own Behalf and
on Behalf of Members of the Association,
Respondents.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AND NEW YORK COUNTY BOARD OF THE ANCIENT ORDER OF HIBERNIANS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th St., N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400

* Counsel of Record

GARY B. BORN *
THOMAS M. CLARK
BERNARD ROBERTS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ERNEST L. MATHEWS, JR.
MAURA R. CAHILL
GLEASON & MATHEWS
26 Broadway, 17th Floor
New York, NY 10004
(212) 425-3240

Counsel for Amici Curiae Center for Individual Rights and New York County Board of the Ancient Order of Hibernians

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

30pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
I. THE STATE COURT INJUNCTION VIOLATES THE VETERANS' RIGHTS OF EXPRESSIVE ASSOCIATION	7
II. THE STATE COURT INJUNCTION VIOLATES THE FIRST AMENDMENT'S PROHIBITION AGAINST VIEWPOINT DISCRIMINATION	13
A. The Injunction Abridged the Veterans' Rights to Free Speech	13
B. The Application of the Public Accommodation Law Is Viewpoint Discrimination That is Absolutely Forbidden by the First Amendment	14
C. The Veterans Have Not Forfeited Their First Amendment Rights By Lacking Detailed Rules or a "Coherent" Message	18
III. EVEN IF IT WERE NOT FORBIDDEN VIEWPOINT DISCRIMINATION, THE INJUNCTION CANNOT BE JUSTIFIED AS THE LEAST RESTRICTIVE MEANS TO ACHIEVE A LEGITIMATE GOVERNMENTAL INTEREST	23
A. Forcing the Veterans To Include GLIB Was Not the Least Restrictive Means of Achieving the Commonwealth's Asserted Policy of Preventing Discrimination on the Basis of Sexual Preference	23

TABLE OF CONTENTS—Continued

Page

B. In any Event, The Parade Cannot Constitutionally be Considered a "Public" Accommodation to Which the Commonwealth Has a Legitimate Interest in Assuring Equal Access 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 15
Alfred L. Snapp and Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 28
Aman v. Handler, 653 F.2d 41 (1st Cir. 1981) 16
Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 8
Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 20
Brandon v. Springspree, Inc., No. 93CA1217, 1994 WL 698685 (Colo. Ct. App. Dec. 15, 1994) 22
Califano v. Webster, 430 U.S. 313 (1977) 28
Cox v. Louisiana, 379 U.S. 536 (1965) 16
Curran v. Mount Diablo Council of the Boy Scouts of America, 29 Cal. Rptr. 2d 580 (Cal. Ct. App.), *rev. granted*, 874 P.2d 901 (1994) 29
Dallas v. Stanglin, 490 U.S. 19 (1989) 11
Frontiero v. Richardson, 411 U.S. 677 (1978) 28
Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 7
Grayned v. City of Rockford, 408 U.S. 104 (1972) 13
Hague v. C.I.O., 307 U.S. 496 (1939) 13
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 28
Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281 (D.Md. 1988) 29
Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston, Superior Court Action, 92-1516 (Dec. 15, 1993) ..... *passim*
Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 636 N.E.2d 1293 (1994) ..... *passim*
Lamb's Chapel v. Center Moriches Union Free School District, 959 F.2d 381 (2nd Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993) 17, 25
Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 14, 24

TABLE OF AUTHORITIES—Continued

Page

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 7
NAACP v. Button, 371 U.S. 415 (1963) 11
New York County Board of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358 (S.D. N.Y. 1993) 2, 4, 13, 17, 18
New York State Club Association v. New York City, 487 U.S. 1 (1988) 7, 8, 28
Niemotko v. Maryland, 340 U.S. 268 (1950) 14
Pacific Gas and Electric Company v. Public Utilities Commission, 475 U.S. 1 (1986) 15
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 14
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 14, 25
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 26, 28
R. A. V. v. City of St. Paul, 112 S. Ct. 2538 (1992) 2, 14, 16, 18
Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 22
Roberts v. United States Jaycees, 468 U.S. 609 (1984) ..... *passim*
Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 417 (Mem.), *granting cert. to* 18 F.3d 269 (1994) 2
South Boston Allied War Veterans Council v. City of Boston, No. CA 94-11402-MLW, 1995 WL 40641 (D. Mass., Jan. 17, 1995) 4, 23
Terminiello v. Chicago, 337 U.S. 1 (1949) 21
Texas v. Johnson, 491 U.S. 397 (1989) 16
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 5, 15
Widmar v. Vincent, 454 U.S. 263 (1981) 14
Wooley v. Maynard, 430 U.S. 705 (1977) 15

TABLE OF AUTHORITIES—Continued

STATE STATUTES Page

Massachusetts General Laws Ann. ch. 272, §§ 92A, 98 (West 1990) 5

MISCELLANEOUS

Alexis De Tocqueville, *Democracy in America* (Vintage Books, 1990) 8, 9, 26

John Nowak & Ronald Rotunda, CONSTITUTIONAL LAW, §§ 16.4, 16.5 (4th Ed., 1991) 20

Michael Matza, *Boston Still Simmering Over St. Pat's Parade Flap*, PHOENIX GAZETTE, March 17, 1994 25

Ronald Rotunda & John Nowak, TREATISE ON CONSTITUTIONAL LAW, § 20.41 (2d Ed., 1992) 11

Irish-American Parade in Cambridge To Accent Unity, BOSTON GLOBE, January 21, 1995 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-749

JOHN J. HURLEY, Individually, and the
SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
An Unincorporated Association By and Through
TIMOTHY DALEY, BARBARA KAY and
CATHLEEN FINN, Acting on Their Own Behalf and
on Behalf of Members of the Association,
Respondents.

**On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts**

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AND NEW YORK COUNTY BOARD OF THE ANCIENT ORDER OF HIBERNIANS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This amicus curiae brief is submitted in support of petitioners John J. Hurley and the South Boston Allied War Veterans Council. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR has sought to advance respect for individual rights, particularly the rights to freedom of speech and expression guaranteed by the First Amendment. *See, e.g., R. A. V. v. City of St. Paul,* 112 S. Ct. 2538 (1992). CIR believes that in recent years courts and government entities, in pursuing goals of social justice and tolerance, have circumscribed fundamental First Amendment rights. CIR believes that a government that regulates or subsidizes private activities must be held to the strictest standards of content and viewpoint neutrality. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 417 (Mem), *granting cert. to* 18 F.3d 269 (1994).

The New York County Board of the Ancient Order of Hibernians ("AOH") has had direct experience of state restrictions on its rights to free speech and expression. Like petitioners in this case, AOH has been the traditional organizer of a large St. Patrick's Day parade. Also like petitioners, AOH faced a city administration that sought to dictate to it which messages should be included in its parade. The New York City Commission on Human Rights found the AOH parade a "public accommodation" and required AOH, despite its longstanding policy of excluding groups with controversial messages or which espoused teachings contrary to the Roman Catholic Church, to admit to its parade a gay and lesbian advocacy group under its own banner. AOH successfully vindicated its position before a federal court in New York in 1993, *see New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F.Supp. 358 (S.D.N.Y. 1993), though only after nearly three years of litigation before seven tribunals.

AOH has since been able to hold its annual St. Patrick's Day parade in New York City free of government requirements as to what the appropriate topic and message should be. However, the cost of the city's intrusion was enormous—in money, diverted energies and rancor that diluted the festive nature of the event. Other chapters of the Hibernian organization have reported similar attempts by local governments to force the inclusion not only of gay and lesbian groups, but also of others, like the Ku Klux Klan, with whom the Hibernians disagree. AOH has a keen interest in the standards this Court may enunciate in the instant case.

STATEMENT OF THE CASE

This case arises from the effort of a group of private organizations and individuals to march on public streets, in a tradition dating to colonial times, to express a collective message. Until the decisions now under review, the City of Boston ("City") had granted the South Boston Allied War Veterans Council ("Veterans") a permit every year since 1947 to conduct their annual St. Patrick's Day/Evacuation Day Parade ("Parade") on the streets of South Boston. In a ruling stemming from the 1993 Parade, a Massachusetts superior court ruled, in effect, that the Veterans could not conduct their Parade unless they allowed respondent Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to march in the Parade under GLIB banners. There is no dispute that GLIB's organizational purpose, and the reason it sought to march in the Parade, was generally to affirm the homosexual lifestyle of its members and to demonstrate the diversity of the Irish-American and the gay and lesbian communities.

The superior court did not rely on the presence of City involvement in the Parade; indeed it specifically found that the City's tangential involvement "did not amount to state action." *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, Superior Court

Action 92-1516 (Dec. 15, 1993), Petition for Certiorari ("Pet. App.") at B16-B24. The court's decision rested on the Veterans' refusal to alter their activities to conform to a message of "inclusiveness." In the words of the state superior court, inclusiveness "*should be* the hallmark of their parade." Pet. App. at B28 (emphasis added). The superior court's grant of a permanent injunction preventing the Veterans from excluding GLIB from their Parade was affirmed by the Massachusetts Supreme Judicial Court. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. 238, 636 N.E.2d 1293 (1994). This Court granted certiorari on January 6, 1995.[1]

SUMMARY OF ARGUMENT

I. The state court injunction plainly violates the Veterans' rights to free expressive association. A public parade is a clear exercise of protected rights of association for the purpose of communicating collective messages and values. As the Court in *Dinkins* noted, a parade organized by a private sponsor is the "quintessential exercise of the First Amendment right of the freedom of expression." 814 F. Supp. at 366.

No rights are more basic to American democracy than the freedom to associate and to speak. As Alexis De Tocqueville said 150 years ago, "the liberty of association has become a necessary guarantee againt the tyranny of the majority." This guarantee protects the rich diversity of American society—where groups as varied as GLIB, the Veterans, abortion rights activists, Greenpeace and Young Republicans have long flourished. The Common-

[1] On January 17, 1995, the United States District Court for the District of Massachusetts issued a memorandum and order that allows the Veterans to conduct a parade in March 1995, of a very different tenor than past Parades, without including GLIB. *See South Boston Allied War Veterans Council v. City of Boston*, CA 94-11402-MLW, 1995 WL 40641 (D. Mass. Jan. 17, 1995). For reasons discussed briefly *infra*, n.20, amici do not believe the District Court's decision moots the controversy at issue in this case.

wealth's insistence on a state-sanctioned display of "inclusiveness" and "diverity" is fundamentally inconsistent with this heritage of voluntary association. The First Amendment does not permit the Commonwealth to forbid private groups from associating unless they do so in a way that affirms official viewpoints.

II. A. The injunction also directly violates petitioners' right to free expression. The superior court's ruling is an express effort to compel private organizations and individuals to communicate a particular state-sanctioned message of "inclusiveness" and "diversity." That effort violates the most basic precepts of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . ." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

B. As authoritatively interpreted by the Commonwealth's courts, Massachusetts General Laws Ann., ch. 272, §§ 92A, 98 (West 1990) (the "Public Accommodation Law") clearly discriminates between speakers based upon the content and viewpoint of their messages. If the Parade takes on the state-sanctioned message of inclusiveness and diversity, it will be permitted; if it conveys other messages (i.e. exclusivity, as the state defines it) or simply does not wish to address a controversial subject, the Parade will not be permitted. The Commonwealth's message may be an enlightened one consistent with our heritage of tolerance, but the First Amendment does not allow the Commonwealth to compel its citizens to affirm that message. Above all else, the First Amendment grants American citizens the freedom to choose what they will, and will not, say.

There is no merit to the suggestion that the Commonwealth was merely enforcing a content—and viewpoint—neutral Public Accommodation Law. The superior court made this clear: "a *proper* celebration of St. Patrick's and

Evacuation Day *requires* diversity and inclusiveness." Pet. App. at B24 (emphasis added).

Moreover, the asserted content-neutral policy of assuring equal access to public streets and other public facilities does not require forcing one private group to include another private group in its expressive conduct. The City could allow two parades equal access to the public streets —each affirmatively celebrating different strands of contemporary American society. Instead, the courts have insisted upon only *one* parade that must convey an officially-approved message of inclusiveness while necessarily muting and distorting the sponsor's intended message. The state court's injunction plainly was not intended to and did not advance the Commonwealth's asserted anti-discrimination policy; instead, it sought to regulate the content and viewpoint of private expression.

C. Finally, there is no basis for the state courts' suggestion that expressive activity must have one coherent, identifiable theme in order to qualify for constitutional protection. While petitioners allowed a diverse group of "messages" to be included in their Parade, this fact does not alter their right to find *some* messages inconsistent with the Parade's basic theme—a celebration of traditional Irish culture *as they see it*. Constitutional protections are not undercut merely because a variety of views are communicated by the Parade, any more than an anthology of poems, a film festival, or an incoherent political platform loses its First Amendment protection. Nor have the First Amendment's protections ever been dependent, as suggested by the state courts, upon a private group's implementation of public rules of administrative procedure.

III. A. There were numerous alternatives by which the Commonwealth could have advanced its goal of securing equal access for gays and lesbians to public facilities without infringing the Veterans' right to free expression. The injunction is thus not the least restrictive means of achieving this policy. Indeed, it is not even rationally related to the asserted interest in preventing sexual orientation

discrimination, since the Parade does not exclude gay and lesbian individuals. The Parade excludes groups—without regard to the sexual preference of its members—that wish to communicate messages relating to gay and lesbian matters. The injunction's real purpose is not ending discrimination against individuals, but rather, forcing private groups to swear allegiance to its notion of inclusiveness.

B. It is no answer for the state courts to relabel the petitioners and their Parade as "public" accommodations and then to withhold First Amendment protections. Those protections are not forfeited because the petitioners use the public streets—the classic public forum. Nor are the First Amendment's protections lost because the Parade is successful, and thereby attracts numerous participants and onlookers with multiple views and voices. A rule treating the Parade and similar events as "public accommodations" entitled to minimal First Amendment protections would threaten the freedoms enjoyed by a wide range of collective public speech involving multiple participants. If the Veterans' Parade is a public accommodation, then so are rock concerts, Rainbow Coalition marches, film festivals, anti-war protests, neighborhood block parties and political conventions. Each of these groupings, like the Parade, may contain a diversity of voices; they still enjoy the full measure of freedom to communicate collective messages of their own choosing.

I. THE STATE COURT INJUNCTION VIOLATES THE VETERANS' RIGHTS OF EXPRESSIVE ASSOCIATION

The First Amendment to the United States Constitution safeguards the historic right of Americans to associate with one another. *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Gilmore v. City of Montgomery*, 417 U.S. 556, 572-75 (1974); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). The First Amendment's protection for associational rights extends in particular to the right of "expressive associa-

tion," where individuals come together for the purpose of communicating their views to the public. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 618-22.

The freedom of private persons to associate with one another has existed since the founding of the Republic. Nearly two centuries ago, Alexis De Tocqueville wrote that: "In no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects than in America. . . . a vast number of [voluntary associations] are formed and maintained by the agency of private individuals." 1 A. De Tocqueville, DEMOCRACY IN AMERICA 191-94 (Vintage Books, 1990). This is because:

> The citizen of the United States is taught from infancy to rely upon his own exertions, in order to resist the evils and the difficulties of life; he looks upon the social authority with an eye of mistrust and anxiety, and he claims its assistance only when he is unable to do without it. . . . The same spirit pervades every act of social life. . . . In the United States associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society. *Id.*

The historic freedom of association is vital to American liberty and democracy. Our rights as individuals to speak and worship freely require a corresponding liberty to associate with others. The Supreme Court has repeatedly recognized that the "ability and the opportunity to combine with others to advance one's views is a powerful practical means" of assuring First Amendment freedoms. *Club Ass'n*, 487 U.S. at 13. Moreover, this freedom of association is vital to "preserving political and cultural diversity" and to "shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

Again in De Tocqueville's words, "an association unites into one channel the efforts of divergent minds and urges them vigorously towards the one end which it clearly points out." 1 A. De Tocqueville, DEMOCRACY IN AMERICA at 192. Moreover, "the power of meeting" enhances the freedoms of association and speech: individuals "have the opportunity of seeing one another; means of execution are combined; and opinions are maintained with a warmth and energy that written language can never attain." *Id.* And for all these reasons, it is as true now as ever that "the liberty of association has become a necessary guarantee against the tyranny of the majority." *Id.* at 194.

The Veterans' Parade clearly enjoys First Amendment protections for expressive association. The Veterans associate with one another because they share a communal view of traditional values—collective values that they come together with others to celebrate in their St. Patrick's Day Parade. Conversely, the Veterans have excluded other groups that express views the Veterans believe will contradict or dilute their intended message, including the Ku Klux Klan, ROAR and an anti-gay rights group. The Veterans' public assembly for the purpose of conveying some views, but not others, is pure expressive association.

The fact that the Parade provides amusement for a diverse group of citizens in no way vitiates the Veterans' right to use their Parade to promote the message they want to convey. The fact that Parade participants may include groups that have no particular relationship to each other is also irrelevant. Nothing in the First Amendment limits the freedom of association to single-issue interest groups, cohesive lobbies, or tightly-knit religious sects.

Comparing the Veterans' Parade with other examples of protected expressive association leaves no doubt that it too enjoys First Amendment protection. *Cf. Roberts*, 468 U.S. at 621-23 (group that was "neither small nor selective," but that engaged in various protected "political,

social, economic, educational, religious, and cultural ends" had clearly implicated right of expressive association).[2] While the Parade's mesage may be subtle, and in some sense less focused and contentious that the message GLIB wishes to convey, it is no less protected. *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring) ("It is easy to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service.")[3]

The application of the Public Accommodation Law against the Veterans' privately sponsored Parade is part of a growing tendency of government at all levels to subject private groups and individuals to increasingly pervasive regulation of association and expression. These regulations ignore the bedrock principle that under the First Amendment, it is for American citizens—not state

---

[2] Moreover, to the extent *Roberts* makes selectivity a factor in evaluating freedom of association claims, and given that the superior court specifically relied on the Veterans' alleged "lack of selectivity" in finding the Parade a public event covered by the Public Accommodation Law, Pet. App. at B9, the Massachusetts Supreme Judicial Court was surely wrong in branding the Veterans' past decisions to exclude the Ku Klux Klan, ROAR and an anti-homosexual group as of "no legal relevance." 636 N.E.2d at 1296 n.10.

[3] It has, of course, been petitioners' contention that part of the Parade's mesage is to promote traditional values as they see them. Comparison with *Roberts* is illuminating. In *Roberts,* the exclusion at issue was aimed at a class of persons, women, without regard to their viewpoints on any issues, making it unlikely that the exclusion was part of an associational message. In the Veterans' case, the exclusion is aimed not at a class of people, not homosexuals or lesbians as such (who are welcome to march in the Parade as individuals), but rather as a group, GLIB, whose avowed purpose is to convey a message. This suggests inescapably that the Veterans' exclusion is based on the message GLIB would convey. *Cf. Roberts,* 468 U.S. at 609 ("[the Act] imposes no restrictions on the organization's abilities to exclude individuals with ideologies or philosophies different from those of its existing members.")

officials—to decide what they wish to say and with whom they wish to associate in order to say it. That freedom is denied when, as here, government officials require private groups to affirm state-sanctioned views. It is equally denied when, again as here, state regulations deprive private groups of the freedom to associate and engage in expressive activity with those of their choice. In De Tocqueville's words, collective ideas and messages are only possible when "an association unites into one channel the efforts of divergent minds." Without this breathing space for self-definition,[4] and the formulation of collective ideas and messages,[5] the freedoms of speech and association

---

[4] *See NAACP v. Button*, 371 U.S. 415, 433 (1963).

[5] Primarily commercial organizations are not in the business of defining their identities, goals and views in this constitutional sense, and there is thus no reason to fear, as the Supreme Judicial Court intimates, 636 N.E.2d at 1298 n.13, that finding for the Veterans would insulate commercial activities such as restaurants from the reach of antidiscrimination laws. As Justice O'Connor has observed in *Roberts*, the commercial/expressive distinction is the relevant one for determining whether regulation should be subject to rational review or heightened scrutiny. 468 U.S. at 635; Ronald Rotunda & John Nowak, TREATISE ON CONSTITUTIONAL LAW § 20.41 (2d ed. 1992). GLIB has not argued and the courts below did not find that the Parade was a commercial event, indeed the superior court found that the Parade was a "social association." Pet. App. at B24. To be sure, the superior court then attempted to analogize status as a social organization to *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), where this Court stated that a group that comes together only for recreational activities and admits all-comers was not entitled to First Amendment protections. The dissimilarity of the instant case from *Dallas*, however, is made clear by the superior court's very next sentence, recognizing that in the Parade groups "espousing myriad themes and values" come together. The superior court thus did not find, as would be necessary under Justice O'Connor's approach, that the Parade was primarily commercial and not significantly dedicated to expressive activities. Indeed, it found the exact opposite, but merely concluded that since the messages were not internally consistent, the Parade was not entitled to First Amendment protection. This ignores the Veterans' central contention that the Parade had a

are nothing more than the liberty to say what is permitted and associate as the state allows. That is a concept that is being abandoned even in those parts of the world where it once held sway—and it is wholly alien to this country.

The First Amendment serves to protect the rich diversity of American society—what De Tocqueville called the "great multitude" of voluntary associations. This protection has for centuries ensured that groups as diverse as the Veterans, anti-war protesters, Republicans, abortion rights activists, Greenpeace, pro-life groups, the NAACP and countless others may come together to communicate their own distinctive messages. Likewise, the First Amendment has ensured that GLIB may conduct parades, festivals, or protests—without state-mandated inclusion of skinheads or anti-gay messages, or outright prohibition.

The Commonwealth's rulings would change all this. While superficially pretending to enhance a diversity of views, the rulings would lead, as was the case with the cancelled 1994 Parade, to the silencing of authentically distinctive views that would otherwise be heard. In place of the vibrant multiplicity of traditional American volunteerism, the Massachusetts courts would substitute, at best, an homogenized effort to be all things to all people. At worst, it would allow the very sorts of compelled official orthodoxy that other countries have only recently, and rightly, abandoned.

---

theme of traditional values that, while accommodating numerous sub-messages not inconsistent therewith, could not accommodate, in the Veterans' view, an affirmation of the homosexual lifestyle. That the Veterans have in fact sought to espouse such a theme is shown beyond cavil by the fact that they have expended so much time and energy in attempting to exclude GLIB from marching under its own banners.

II. THE STATE COURT INJUNCTION VIOLATES THE FIRST AMENDMENT'S PROHIBITION AGAINST VIEWPOINT DISCRIMINATION

A. The Injunction Abridged the Veterans' Rights to Free Speech

The Veterans' St. Patrick's Day Parade implicates separate First Amendment protections for *expressive activity itself*. A parade is a quintessentially communicative and expressive event; it is by definition a public display and an attempt to communicate with others. *Dinkins*, 814 F. Supp. at 366. Moreover, the Parade takes place on the public streets, themselves the classic public forum.[6] Much like other parades based on shared cultural, ethnic or religious experiences, the Veterans have demonstrated that a principal purpose of the Parade is to affirm their vision of traditional Irish culture,[7] while also welcoming into their ranks those they perceive as their well-wishers of myriad backgrounds. The Veterans require only that participants not voice views inconsistent with the overall theme of the Parade.

It would be difficult to find an example of protected First Amendment expression more clearcut than the Veterans' Parade. The Parade is a deliberate and concerted effort by a group of private individuals to communicate a message—of their own selection and crafting —to themselves, their neighborhood, the City, and the public at large. It matters not whether their message is a message that all Irish-Americans, or all Bostonians, find correct. What is fundamental is that the Parade partici-

---

[6] *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (public streets have from time immemorial been "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

[7] *See* 636 N.E.2d at 1295 (noting Veterans' assertion that the decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values.)

pants are engaged in speech—of the most public character conceivable. People are free to reject that vision and instead attend a parade whose message is more to their taste.[8] That rejection, however, cannot become the basis for censoring the unpopular.

B. The Application of the Public Accommodation Law Is Viewpoint Discrimination That Is Absolutely Forbidden by the First Amendment

Because the Veterans' Parade is protected First Amendment activity, governmental interference with the Parade is subject to the most rigorous scrutiny. First, the State is flatly and absolutely forbidden from imposing viewpoint-based limitations on the Veterans' Parade. As this Court recently declared in *R. A. V. v. City of St. Paul,* 112 S. Ct. 2538, 2547 (1992), "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[9]

If the state cannot forbid speech voicing disfavored viewpoints in a public forum, it follows that the state cannot force private expressive activity to voice favored viewpoints. Thus, a fundamental precept of the First Amendment is that the State may not compel individuals or groups to express state-sanctioned viewpoints. *E.g., West*

---

[8] Indeed, such alternatives have already appeared in the wake of these events. *See Irish American Parade in Cambridge To Accent Unity,* BOSTON GLOBE, January 21, 1995, at 15.

[9] *Members of the City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983); *Widmar v. Vincent,* 454 U.S. 263, 276 (1981); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) (the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Niemotko v. Maryland,* 340 U.S. 268, 284 (1951) (State cannot exclude Jehovah's Witnesses from public park for religious meetings, when other religious and political meetings have been permitted).

Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding unconstitutional a state law requiring public school students to recite Pledge of Allegiance); *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (holding unconstitutional state law requiring motorists to display license plate with slogan "Live Free or Die"). Nor can individuals be required to express the views of third parties with whom they disagree, *e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-36 (1977) (state may not require employees to make union contributions to be used for political purposes); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 (1974) (holding unconstitutional state law requiring newspapers to print replies by political candidates); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10-11 (1986) (plurality opinion) (State could not compel public utility company to include in its billing envelopes messages of a third party with whom the utility disagreed).

The injunction has both the avowed purpose and direct effect of imposing an official, government-approved viewpoint on the Parade, one contradicting and confusing the message the organizers wish to project. By requiring that the Parade adopt a policy of inclusion, and by requiring that the Parade include outspoken advocates of homosexual lifestyles, the state courts have affirmatively dictated the content and viewpoint of the message expressed by the Parade.

There is absolutely no substance to suggestions that including GLIB in the Veterans' Parade would not affect the message of the Parade. That is conclusively demonstrated by the intensity of the protracted efforts of all concerned in this dispute—including the City, the Veterans and GLIB. This dispute arises, with such passion, precisely *because* of the genuine and important differences between the messages communicated by the Veterans and by GLIB.

Even if bias against homosexuals were the message that the Veterans wished to convey—and it *emphati-*

cally is not [10]—the Commonwealth could not constitutionally suppress those views. Bias against those with alternative sexual preferences is inconsistent with the most basic values of progressive America. But this Court has recently, and repeatedly, emphasized that "[t]he First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive--will go unquestioned in the marketplace of ideas." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." [11]

The Commonwealth's effort to require the Veterans to express a particular viewpoint is simply and flatly forbidden by the First Amendment. The superior court found the excluding of groups with sexual themes to be violative of the Public Accommodation Law's prohibition on sexual orientation based discrimination. 636 N.E.2d at 1295.

---

[10] It warrants emphasis that the Veterans have no objection to individual homosexuals marching in the Parade, and have no wish to foster an anti-homosexual message. But for the City's effort to control the Parade's content, there would be no mention of sexual preference in the Parade. The state courts and GLIB, however, finding this silence on the subject not satisfactorily "inclusive," have actually dictated inclusion of a subject the Parade's organizers would otherwise have left out. This is content-based speech dictated by the state at its plainest.

[11] *Texas v. Johnson*, 491 U.S. 397, 414, 418 (1989). *See also R.A.V.*, 112 S. Ct. at 2547; *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) ("I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. . . . This seems to me to be censorship in a most odious form. . . .") (Black J., concurring); *Aman v. Handler*, 653 F.2d 41, 44 (1st Cir. 1981) (First Amendment rights are implicated when university denies privileges to student group because of disagreement with group's philosophy).

At the very least, this is content discrimination, since it give preferred status and protection to particular themes, in this case, sexuality.[12] While such content discrimination —*if viewpoint neutral*—might arguably be justified in limited public fora, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2147 (1993), it is never justified in a classic public forum like the city streets where the Veterans' Parade takes place. And beyond doubt, the stated policy of inclusion is simply not content-neutral; it is a genuine strongly-held conviction about what message the Parade should convey. The superior court stated the official orthodoxy that the Parade was obliged to adopt in no uncertain terms: "a *proper* celebration of St. Patrick's and Evacuation Day *requires* diversity and inclusiveness." Pet. App. at B24 (emphasis added). The First Amendment plainly forbids this. The *Dinkins* court was surely right in declaring that "[s]uch activity (telling citizens what they must think and how they must express themselves) is something one would expect from the 'Thought Police' described by George Orwell." 814 F. Supp. at 369.

In any event, the state courts' application of the Public Accommodation Law plainly goes beyond content discrimination to actual viewpoint discrimination. The superior court rejected the Veterans' claim that they demonstrated their selectivity by excluding ROAR and the Ku Klux Klan from past parades, noting that those groups are not protected by the Public Accommodation Law. Pet. App. at B7, 636 N.E.2d at 1295. The Supreme Judicial Court also found the Veterans' exclusion of a truck carrying anti-homosexual signs to be "of no legal relevance," *id.* at 1296 n.10, presumably for the same reason. As interpreted by the Massachusetts courts, the

---

[12] Even if the Commonwealth's actions were content-neutral, they would still violate the First Amendment. The inclusion of GLIB was not the least restrictive means of preventing sexual preference based discrimination. See Part III.A, *infra*.

Public Accommodation Law thus has the effect of protecting only pro-homosexual messages, and not anti-homosexual messages.[13] The state simply cannot compel or sanction speech in a manner favoring one side in a debate. *Cf. R.A.V.*, 112 S. Ct. at 2547-48. And even more clearly, it cannot compel private citizens to affirm a particular state-sanctioned viewpoint.

C. The Veterans Have Not Forfeited Their First Amendment Rights By Lacking Detailed Rules or a "Coherent" Message

The Massachusetts courts advanced a variety of related arguments designed to deny the Veterans their First Amendment rights. The courts first suggest that the Veterans were not engaged in expressive speech, asserting that their Parade was not selective.[14] They distinguished *Dinkins* on the ground that AOH had "adopted rules to prevent parade participants from using that parade as a forum to express views inconsistent with the views of the

---

[13] It is conceivable that the Public Accommodation Law would be more viewpoint neutral in the case of anti-homosexual messages based on a religious theme, as a class protected under the law, i.e., religion, would then be implicated. This would, however, result in the law not only generally favoring one side in a debate but also in its then differentiating on the basis of which kinds of arguments one side may use.

[14] The lower courts' effort to distinguish *Dinkins* on the basis of group selectivity illustrates their confusion between the free speech and free expressive association claims. The court in *Dinkins*, while opining that there "may well be substance" to the AOH claim that its right to free expressive association was violated by New York's actions, 814 F. Supp. at 368, actually ruled only on AOH's free speech claim. The Massachusetts courts' discussion of the Veterans' supposed lack of selectivity in approving Parade participants, while conceivably relevant to the *Roberts* factors at issue in a free expressive association claim, is unrelated to the ground on which *Dinkins* was actually decided. Amici are not aware of any cases holding that a pure free speech claim turns on how selective the speaker was in crafting the message.

Ancient Order of Hibernians or the Roman Catholic Church." 636 N.E.2d at 1299. That is irrelevant.

It is true that AOH as an organization is selective, and more explicitly religious in character than the Veterans. It is also true that the AOH parade has historically had more formal procedures in place to select parade participants than was the case with the Veterans' Parade. But the First Amendment's protections are not limited to groups that have adopted state-sanctioned administrative procedures; such a premise is utterly inconsistent with the historical origins of expressive organizations in America, which were hardly models of bureaucratic rectitude. And it is utterly inconsistent with the notion that the First Amendment serves to protect *private* association and expression. In an age where governments are aggressively pruning cumbersome administrative bureaucracies, it surely cannot be that First Amendment freedoms depend on private groups' implementation of analogous structures.[15]

The Massachusetts courts' parsimonious reading of *Dinkins* jeopardizes the independence of countless parade organizations that may not have as many formal procedures in place as AOH does for selecting parade participants. While there are some factual distinctions be-

---

[15] The superior court put great emphasis on the fact that some Parade participants in past years, such as members of the Boston Bruins hockey team, had even been admitted at the last minute without passing the formal selection process. Pet. App. at B8. Accepting that fact, it does not argue for lesser First Amendment protection. Nothing in the First Amendment demands that private persons, engaged in expressive activity, act like state bureaucracies. What matters, and what the Massachusetts courts do not deny, is that the Veterans did not wish to include the message that GLIB sought to communicate. Apparently the Bruins members did not insist on communicating a message which the Veterans believed inconsistent with the theme of the Parade. Beyond this, it would not matter if the Veterans had previously communicated different messages (for the right to free speech includes the right to change one's speech), or that they had or did not have formal rules regarding participation.

tween the Veterans' Parade and the AOH parade, a rule that the First Amendment protects only highly organized, monothematic parades would endanger all parades—and indeed much associational conduct. Parades or marches organized in haste have no less First Amendment protection than those planned out months in advance. Spontaneous associations, ill-organized grass roots movements, and similarly non-bureaucratic groupings are nowhere excluded from the First Amendment. Indeed, it was precisely these kinds of groups—like those resisting British rule in colonial times—that were most in the Framers' minds when the First Amendment was drafted.[16]

The Massachusetts courts also suggested that the Parade did not convey a sufficiently focussed or coherent message to warrant full First Amendment protection.[17] That is plainly inconsistent with the First Amendment. The Constitution affords no more protection for sound bites and single-issue tracts than for anthologies of poems, rambling speeches or "unfocussed" symposia. Nor would the First Amendment's historic protections be served by lower court and bureaucratic scrutiny of proposed messages for their "coherence."

---

[16] *See*, John Nowak & Ronald Rotunda, CONSTITUTIONAL LAW §§ 16.4, 16.5 (4th ed. 1991).

[17] As the Supreme Judicial Court noted, the superior court found that the interests and viewpoints represented in the Parade were "truly catholic," 636 N.E.2d at 1296, and thus found it "impossible to discern any expressive purpose entitling the Parade to protection under First Amendment." *Id.* at 1298. The evisceration of First Amendment rights worked by this reasoning is significant: Rainbow Coalition or grassroots anti-tax parades contain a sweeping diversity of views, many in tension or contradictory—yet the state ought not therefore be permitted to require the inclusion of fascist, pro-tax or other viewpoints that the coalition organizers do not wish to include. Even assuming there was such a "coherence" requirement, the high court was wrong to defer to the superior court's findings under a "clearly erroneous" standard, *id.* at 1299, instead of conducting an independent review. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984).

Conditioning First Amendment protections on narrowly focussed messages would also deny those who wish to convey a message the right to demonstrate, as part of that message, their connection with the wider community of interests in which they live. Ironically, GLIB asserts as one of its goals the broader public appreciation of the fact that its members are part of the larger Irish-American community. One appropriate way to do this is to organize GLIB's own parade inviting members of local sport teams, representatives of well known businesses, government agencies, etc.

Under the reasoning of the Massachusetts courts, however, inclusion of those groups would render the message so "diverse" that it would forfeit First Amendment protection. GLIB, as the price for showing the support it had won in the wider community, could be forced to allow in their march traditionalist Catholic groups identifying themselves as opposed to homosexuality; indeed, failure to admit such a group on the grounds of its religious beliefs would appear to violate the Public Accommodation Law's prohibition on discrimination based on religion, at least as interpreted by the courts below.[18] Such a result would be wholly at odds with the sound holding of *Dinkins* that it is for parade sponsors, not the state, to define their own message.

AOH has already experienced the injury that results from this kind of state intrusion. Before its rights were

---

[18] Amici, of course, believe neither group should be forced to include marchers with themes the group deems inconsistent with the organizers' views, and that the Public Accommodation Law (assuming, as amici deny, that it can be applied to a privately organized parade) is more sensibly interpreted as prohibiting only discrimination against classes of people, and not discrimination about what views are expressed. As it is, the interpretation of the Public Accommodation Law by the Massachusetts courts, which is binding on this Court, *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), results in working a facially invalid regulation of private speech.

vindicated in *Dinkins*, the New York Human Rights Commission informed AOH that the Commission, not AOH, knew what the parade's message was. The Commission decided that the parade was really about "broad celebratory goals" that would not be compromised, but rather enhanced, by a more inclusive message. It based this conclusion on the fact that many contingents of varied backgrounds marched in the AOH parade. While this is true, the court in *Dinkins* rightly found that in a privately sponsored parade, the decision on what messages were or were not to be communicated was up to the sponsors.[19] AOH did not lose its rights to exclude messages deemed inconsistent with, *inter alia,* Catholic teaching, just because it allowed some marchers whose message had no bearing on Catholic teaching.

Lastly, the reasoning of the Massachusetts courts would bring about another perverse effect. Under the opinions below, the highest protection would be afforded to the most focussed, controversial, political and divisive types of speech. Minimal protections would be afforded to more subtle, generalized, but perhaps no less important messages that civic and community groups may wish to sponsor. *Cf. Roberts,* 468 U.S. at 636 (O'Connor, J., concurring). As a result, groups wishing simply to have a "family parade" or a "community celebration" would be powerless to exclude the more confrontational voices, be they the gay and lesbian advocates, the militant pro-life activist, or even political extremists, from hijacking the groups' low-key (though perhaps well attended) celebrations for the activists' own ends. *See Brandon v. Springspree, Inc.,* No. 93CA1217, 1994 WL 698685 (Colo. Ct. App. Dec. 15, 1994) (privately organized community festival had right to exclude anti-abortion minister from

---

[19] This is also the clear teaching of this Court. *See, e.g., Riley v. National Fed'n of the Blind,* 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates the presumption that speakers, not the government, know best both what they want to say and how to say it.").

preaching within festival confines, especially where objection was not based on viewpoint but rather on the entire subject matter). And indeed, the instant case shows this effect at work, with the Veterans being forced to turn their Parade into a more confrontational protest even in order to secure First Amendment protection. *See South Boston Allied War Veterans Council v. Boston,* CA 94-11402-MLW, 1995 WL 40641 at *28 (D. Mass. Jan. 17, 1995). The Veterans should not be forced to turn a generally positive community event into a more pointed protest to secure their right to free speech.[20]

III. EVEN IF IT WERE NOT FORBIDDEN VIEWPOINT DISCRIMINATION, THE INJUNCTION CANNOT BE JUSTIFIED AS THE LEAST RESTRICTIVE MEANS TO ACHIEVE A LEGITIMATE GOVERNMENTAL INTEREST

A. Forcing the Veterans To Include GLIB Was Not the Least Restrictive Means of Achieving the Commonwealth's Asserted Policy of Preventing Discrimination on the Basis of Sexual Preference

Even if the Commonwealth were just applying a content-neutral policy, it could only burden the Veterans' First Amendment rights if it employed the least restrictive means of achieving the governmental purpose. *Roberts,* 468 U.S. at 628 ("no greater than is necessary to accomplish the State's legitimate purpose"); *Taxpayers for Vin-*

---

[20] This dilemma explains both why the standards announced by the Massachusetts courts must be corrected by this Court, as well as why this case is not moot in light of the district court's recent ruling with respect to the 1995 Parade. Under that ruling, the Veterans may march so long as they have a significant and sincere element of their Parade devoted to protest of the decisions here under review. It can hardly be the Veterans' desire to celebrate St. Patrick's Day henceforth only with black flags at the head of their Parade. Only this Court, by reversing the judgment of the Supreme Judicial Court, can allow the Veterans to express their preferred message in their Parade.

cent, 466 U.S. at 810. The injunction plainly does not satisfy this standard. Numerous alternatives far less restrictive of the Veterans' constitutional rights existed.

The City could have granted a separate parade permit to GLIB, allowing it equal access to the public streets. Beyond this, the City could have forcefully expressed its support for GLIB and the policy of inclusion. Indeed, the City's Mayor has already indicated that the City may organize its own parade which will include GLIB.[21] Or the Commonwealth could have dispatched high officials to march together with GLIB and not with the Veterans.[22]

Any of these alternatives would have afforded GLIB at least equal access to the public streets, facilities, funds and support. But the courts chose instead to apply the Public Accommodation Law in a way that will seriously distort and suppress the Veterans' message. Rather than giving two parades equal access to the streets—each affirmatively celebrating different strands of contemporary America—the Commonwealth instead has insisted upon only *one* parade that must convey a single, officially-approved message. This is not an action designed to have the least restrictive effect on the Veterans; it requires the Veterans either to convey the state-approved policy of inclusion or remain silent.[23]

Most fundamentally, the injunction does not even arguably advance the stated policy of preventing discrimination in public accommodations. There has been no suggestion that individual gays and lesbians are excluded from the Veterans' Parade. It is only insofar as the

---

[21] Michael Matza, *Boston Still Simmering Over St. Pat's Parade Flap,* PHOENIX GAZETTE, March 17, 1994, at A13.

[22] Virtually the entire New York City political hierarchy marched in a gay counterdemonstration rather than the AOH parade in 1992.

[23] Or, of course, to change the tenor of their Parade to that of protest. *See supra,* n.20 and accompanying text. This is a choice to which the Veterans cannot constitutionally be forced.

state succeeds in altering the content, message and symbolic character of the Parade that the asserted objective is advanced. This latter effort, of course, is precisely the type of viewpoint and content-based discrimination that the First Amendment forbids.

B. In Any Event, The Parade Cannot Constitutionally Be Considered a "Public" Accommodation to Which the Commonwealth Has a Legitimate Interest in Assuring Equal Access

It is no answer for the state courts to relabel the Veterans' Parade as a "public" event or accommodation. The Veterans themselves are a private, voluntary association in the truest sense. They are a selective group, defined by their shared views of traditional Irish culture and values and by their efforts through the Parade to communicate those views and their idea of reverence for St. Patrick to the public. Indeed, in this respect, the Veterans and their Parade are a classic example of a voluntary association of private citizens seeking to communicate to the public. As De Tocqueville described: "An association consists simply in the public assent which a number of individuals give to certain doctrines and in the engagement which they contract to promote in a certain manner the spread of those doctrines." 1 A. De Tocqueville, DEMOCRACY IN AMERICA at 192.

Permitting the Commonwealth to treat the Veterans' Parade as a "public" accommodation, and thereby deny it the First Amendment protections enjoyed by private persons, would seriously compromise our constitutional freedoms. While the Parade is held in the streets—a classic "public" forum—this is wholly unrelated to the notion of a "public" accommodation. Indeed, the power of the government to limit speech is at its nadir in a true public forum. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 385 (2d Cir. 1992), *rev'd on other*

grounds, 113 S. Ct. 2141 (1993). The state courts' theory would turn the First Amendment on its head—allowing the government the greatest latitude to regulate speech in a forum where this Court has clearly stated that its power is at its most limited.[24]

---

[24] This Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), is instructive. There, the Court held that the First Amendment did not invalidate a California constitutional provision requiring shopping centers to permit the distribution of leaflets. The Court's holding was carefully limited in several crucial respects. First, the Court emphasized that the shopping center was "a business establishment that is open to the public to come and go as they please." *Id.* at 87. Second, the views of pamphleteers "will not likely be identified with those of the owner." *Id.* Third, "no specific message is dictated by the State to be displayed," and consequently there "is no danger of governmental discrimination for or against a particular message." *Id.* Finally, the shopping center could "disavow any connection with the [pamphleters'] message." *Id.*

The present case differs in each respect singled out by the *PruneYard* Court. A place in the Parade's order of march is not open to the public; the Parade is a structured and regulated undertaking. The fact that the Veterans have in fact liberally granted access to those whose messages they did *not* deem inconsistent with the Parade in no way changes this fact. Second, there is a significant risk that the GLIB views will either be identified with the Veterans' Parade, or that those views will alter the message conveyed by the Parade. Third, the state courts have dictated a "specific message"—namely, a "policy of inclusion"—and there is consequently a real danger of "governmental discrimination for . . . a particular message." And finally, the Veterans cannot effectively disavow the Parade's connection with GLIB's message or with the altered message that an inclusive Parade will convey.

To analogize, GLIB would have it that the Veterans are analogous to the owner in *PruneYard,* and may thus constitutionally be required by the state to allow GLIB, the "pamphleteers," to speak. The fact that it is the state handing out permits to parade on the streets belies any such comparison. The Veterans and GLIB are both "pamphleteers," and the state has no more right to force the Veterans to accept GLIB into the midst of their expressive activity than it would to condition the pamphleteers' access on their agreement to distribute only a state-approved "inclusive" array of pamphlets.

The fact that the Veterans have successfully conducted the Parade, thereby attracting large audiences and numerous participants, cannot convert them from a private association into a public entity, akin to some arm of the state. The right to free speech serves to protect the freedom of every citizen and group to make its message known, to proclaim its views, and to seek to influence others through public discourse and spectacle.[25] To remove the First Amendment's protections because these efforts are successful would be an unprecedented holding that would bring the popular rock concert, the inspiring preacher, and the appealing political party under state regulation.[26]

To be sure, this Court held in *Roberts* and *Club Association* that content-neutral state anti-discrimination legislation could constitutionally be applied to require "private" groups to admit women members. Those holdings have nothing to do with this case. First, *Roberts* and *Club Association* involved groups that did not seek to exclude members based on contrary values; as described above, that is exactly what the Veterans *are* doing. Second, neither *Roberts* nor *Club Association* involved application of legislation to alter the message communicated by a group's expressive activity;[27] in contrast, the

---

[25] Amicus Curiae AOH spends great effort all through the year to proclaim a message to New York and all who wish to hear it. If one thing is clear in all this, it is that such effort is exerted to put on a spectacle *and reach an audience.*

[26] Newspapers do not lose their First Amendment protections because they reach a certain circulation, nor because they print diverse opinion pieces. And talk shows do not forfeit their constitutional right after gaining a healthy following or attracting a varied cast of participants.

[27] The *Roberts* Court emphasized that the admission of women to the Jaycees would not affect dissemination of any message that the Jaycees wished to convey: the Act was said to impose "no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing mem-

BEST AVAILABLE COPY

City's action in this case does exactly this. Third, both *Roberts* and *Club Association* involved governmental efforts to eradicate discrimination in access to goods and services, including commercial benefits. In this case, participation in a parade simply does not offer the sorts of commercial benefits that existed in *Roberts* and *Club Association*.[28]

At issue here, then, is not achieving equal access to housing, employment, career opportunity, voting and the like, in which the state has a legitimate and even compelling interest, but rather one group wishing to participate in another group's expressive activity. Laudable as that goal may be for the group involved, it is not one that

---

bers." 468 U.S. at 627. Likewise, in *Club Association* the Court noted that the New York Human Rights Law did not prevent the clubs from excluding individuals who do not share the views that the organization wishes to promote. 487 U.S. at 13. This case is wholly different: it does not involve state prohibition of a "private" group's bar against the admission of persons to a general membership organization solely because of their gender. Rather, it involves an organization that already admits all persons without regard to race, gender or sexual preference—but that excludes from collective expressive activity groups of individuals who hold and espouse values contrary to those of the organization.

[28] The *Roberts* Court's treatment of the governmental interest in securing equal access to "public accommodation" clearly dealt only with commercial and economic benefits, albeit broadly defined, not the right to participate in *someone else's* protected speech. This is evidenced by the types of cases relied on in *Roberts: Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (hotel accommodations); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (employment in the apple-picking industry); *PruneYard Shopping Center v. Roberts*, 447 U.S. 74 (1980) (access to a large commercial shopping mall to distribute leaflets); *Califano v. Webster*, 430 U.S. 313 (1977) (government interest in compensating for past inequality in income justified women receiving social security benefits on basis of a higher percentage of past earnings); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (government could not discriminate against female Air Force officer in granting benefits to spouse).

the state has a compelling or permissible interest in achieving. *See Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 594 (Cal. Ct. App., *rev. granted*, 31 Cal. Rptr. 2d 126, 874 P.2d 901 (1994); *Invisible Empire, Ku Klux Klan v. Mayor Thurmont*, 700 F. Supp. 281, 289 (D. Md. 1988).

In sum, *Roberts* and *Club Association* involved relatively non-selective groups, that did not have particularly distinctive messages, being subjected to content-neutral state laws in order to afford important rights of equal access to individuals, without affecting the groups's communicative activities. In contrast, this case involves a selective group, that conveys a distinctive and important message, being subjected to content-based state laws that are not significantly related to assuring equal access to public facilities, and that fundamentally and deliberately compromise the group's expressive activity. The First Amendment does not permit this latter course.

CONCLUSION

For these reasons, the judgment of the Supreme Judicial Court of Massachusetts should be reversed, with instructions to dissolve the superior court's permanent injunction, and such other relief as the Court should deem appropriate.

Respectfully submitted,

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
1300 19th St., N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400

* Counsel of Record

GARY B. BORN *
THOMAS M. CLARK
BERNARD ROBERTS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ERNEST L. MATHEWS, JR.
MAURA R. CAHILL
GLEASON & MATHEWS
26 Broadway, 17th Floor
New York, NY 10004
(212) 425-3240

Counsel for Amici Curiae Center for Individual Rights and New York County Board of the Ancient Order of Hibernians